(2)

No. 88-223

In The

Supreme Court of the United States

October Term, 1988

KATHRYN REILLY and JOSEPH REILLY,
Petitioners,

v.

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, Under ERISA, An Employee Benefit Plan Administrator May Be Held Liable To An Individual Plan Participant For Punitive Damages For Improper Processing Of A Benefit Claim. [The question has been restated to relate specifically to the present case by specifying that recovery is sought by an individual rather than by the plan as a whole.]

2. Whether ERISA Preempts State Law Bad Faith Claims Against Administrators of Self-Insured Employee Benefit Plans. [The second question has been restated to reflect the self-insured nature of the instant employee benefit plan.]

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Kathryn and Joseph Reilly, and the Respondent, Blue Cross and Blue Shield United of Wisconsin.

In compliance with Supreme Court Rule 28.1, Blue Cross and Blue Shield United of Wisconsin provide the following list of affiliated corporations:

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN

Subsidiaries and Affiliates

Comp Care Health Services Insurance Corp. (wholly owned)

Pro-Health, Inc. (wholly owned)

Take Control, Inc. (owned 60% by Blue Cross and Blue Shield United of Wisconsin, and 40% by Pro Health, Inc.)

United Wisconsin Services, Inc. (wholly owned)

a) United Wisconsin Insurance Company (which is itself the 100% owner of Leasing Unlimited, Inc.)

b) United Wisconsin Life Insurance Company

c) United Wisconsin Proservices, Inc.

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STATEMENT OF THE CASE

The Respondent does not take issue with the Petitioners' Statement of the Case except in two respects.

In the first instance, Petitioners refer to the denial of the "insurance claim" for Mrs. Reilly's benefit. Petition, p.3. In the second instance, Petitioners note that their original complaint claimed that "... Blue Cross breached the insurance contract. ..." Petition, p.3.

It is inaccurate in both instances to suggest that the benefit plan involved is an "insured" plan. The District Court recognized the non-insured nature of the plan, stating:

> "The MPS Plan is self-insured in that MPS bears the risk and responsibility for the payment of benefits to the employees. Blue Cross, in its capacity as plan administrator, makes the determinations as to whether to grant or deny claims, is not at risk for any health care costs and receives an administrative fee based on the dollar volume of claims honored." Petitioners' Appendix, p. 27.

The Court of Appeals also noted that Respondent (Blue Cross) served as the plan administrator and *not* as an insurer:

> "In this case, the plan administered by Blue Cross is self-insured. It is entirely funded by the MPS and MTEA. Neither entity is an insurer and, accordingly, the deemer clause applies." Petitioners' Appendix, p.19.

Respondent believes the distinction between insured and uninsured plans is an important one for purposes of determining whether certain state law claims, such as the bad faith claim asserted by Petitioners in the present action, survive preemption under ERISA.

Respondent further accepts Petitioners' Appendix and will make reference thereto in the same manner employed by Petitioners.

ARGUMENT

I. ERISA Does Not Authorize The Recovery Of Punitive Or Extra-Contractual Damages

Petitioner suggests that there is a conflict between Circuits as to whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. sec. 1001, *et. seq.*, permits the recovery of punitive or extra-contractual damages. A review of Petitioners' authorities demonstrates conclusively the absence of any such conflict.

Petitioner cites *Kuntz v. Reese*, 760 F. 2d 926, 938 (9th Cir. 1985), *cert. denied* 107 S.Ct. 318 (1986), as authority for the availability of ERISA punitive damages in the Ninth Circuit. While the *Kuntz* court did permit the recovery of punitive damages, that decision was issued in May of 1985, prior to the June, 1985 decision of this Court in *Massachusetts Mutual Life Insurance Company v. Russell*, 105 S.Ct. 3085 (1985) (hereinafter "*Russell*"). In a subsequent decision, the Ninth Circuit, in *Sokol v. Bernstein, M.D.*, 803 F. 2d 532 (9th Cir. 1986), adopted the rationale of *Russell, supra*, to deny punitive damages under ERISA sec. 409(a), 29 U.S.C. sec. 1109(a). The *Sokol* court then went on to consider the potential availability of punitive damages under ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3), stating:

> "From the preceding analysis of *Russell*, we think it clear that the Court's reasons for disallowing extra-contractual damages extend to §502(a)(3), *footnote 5* notwithstanding. However, even assuming *arguendo* that *Russell's* rationale does not extend to §502(a)(3), a conscientious examination of the statute's legislative history compels the conclusion that extra-contractual damages are unavailable." (p.537).

The only other decision cited by Petitioners to demonstrate a conflict between Circuits is *Monson v. Century Manufacturing Co.*, 739 F. 2d 1293 (8th Cir. 1984). Petitioners are flatly wrong in suggesting that *Monson* permits

recovery of ERISA punitive damages in the Eighth Circuit. Petitioners' precise contention was addressed by another District Court within the Eighth Circuit in *Hollenbeck v. Falstaff Brewing Corporation*, 605 F. Supp 421 (E.D. Mo., 1984). In rejecting the contention that *Monson* permitted recovery of punitive damages, the *Hollenbeck* court stated:

> "It is highly doubtful that the Eighth Circuit Court of Appeals would affirm an award of punitive damages in an ERISA case. *See Dependahl v. Falstaff Brewing Corp.*, 653 F. 2d 1208, 1217 (8th Cir. 1981). Plaintiff, however, has cited *Monson v. Century Manufacturing Co.*, 739 F.2d 1293 (8th Cir. 1984), for the proposition that punitive damages are now recoverable in an ERISA case within the Eighth Circuit. *But Monson does not hold, state, infer, or support the proposition that punitive damages are recoverable on an ERISA cause of action.* . . . The district court awarded, and the Court of Appeals affirmed, punitive damages *only as to the non-ERISA profit sharing program* under the Minnesota common law of fraudulent misrepresentation. . . . No punitive damages were awarded for any cause of action relating to the ERISA pension plan. *See Monson v. Century Manufacturing Co.*, No. 4-80-Civil-614, mem.op. (D.Minn. May 17, 1983)." (p.435, 436) (Emphasis added)

Respondent's research has disclosed no Court of Appeals Decisions subsequent to *Russell* in which punitive or extra-contractual damages have been permitted under ERISA. In fact, it appears that, in addition to the decision of the Ninth Circuit in *Sokol, supra*, each of the other Courts of Appeals to have considered this issue has also specifically concluded that ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3), does *not* permit the award of such damages. *See, Varhola v. Doe*, 820 F. 2d 809, 817 (6th Cir. 1987); *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F. 2d 1456, 1464-1465 (5th Cir. 1986) *cert. denied*, 107 S.Ct. 884, 107

S.Ct. 1298 (1987); *Bishop v. Osborn Transportation, Inc.*, 838 F. 2d 1173, 1174 (11th Cir. 1988); *Powell v. Chesapeake and Potomac Telephone Company of Virginia*, 780 F. 2d 419, 424 (4th Cir. 1985), *cert. denied* 476 U.S. 1170 (1986) *Dependahl v. Falstaff Brewing Corp.*, 653 F. 2d 1208, 1216 (8th Cir.) (dictum), *cert. denied* 454 U.S. 968, 454 U.S. 1084 (1981).

Far from demonstrating any conflict, the afore-cited decisions clearly support the present decision of the Seventh Circuit denying the recovery of punitive and extra-contractual damages under ERISA.

II. Petitioners' State Law Claim of Bad Faith Is Preempted By ERISA.

As noted in Respondent's comments relative to the Statement of the Case, both the District Court (Petitioner's Appendix, p. 27) and the Court of Appeals (Petitioners' Appendix, p.19) recognized the self-insured nature of the present plan.

Notwithstanding this recognition, Petitioners seek to rely on the insurance regulation "savings clause" of ERISA sec. 514(b)(2)(A), 29 U.S.C. sec. 1144(b)(2)(A) to protect their claim for state-law based "bad faith" damages. Petitioners fail to recognize that, absent some element of insurance, there is simply nothing on which the "savings clause" might operate.

Petitioners argue that to distinguish between the regulation of insured and uninsured plans would be contrary to the intent and purpose of ERISA (Petitioners' Petition, p.10). That argument, however, ignores that this distinction is mandated by the statute as a result of Congress' effort to preserve to the States their traditional right to regulate insurance, notwithstanding Congress' desire to provide otherwise comprehensive regulation over employee benefits. This distinction was specifically noted and acknowledged by this Court in *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct.

2380 (1985), where the Court stated:

> "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing, we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one itA has chosen not to alter." (p. 2393)

Petitioners reliance on *Simmons v. Prudential Insurance Company of America*, 641 F. Supp. 675 (D.Colo. 1986) and *Presti v. Connecticut General Life Insurance Company, Inc.*, 6A05 F. Supp. 163 (N.D.Cal. 1985) is misplaced, since in each case the plans in question involved some element of insurance to which the ERISA "savings clause" could attach. The decision in *Lueck v. Aetna Life Insurance Company*, 116 Wis.2d 559, 345 N.W.2d 699 (1984) suggests that the plan involved there may have been uninsured, although the decision contains no reference to or discussion of the effect of ERISA on either the plan or claim under consideration. Respondent respectfully submits that, to the extent *Lueck* failed to consider ERISA and to the extent its holding is contrary to *Metropolitan*, *supra*, it is wrongly decided.

Respondent further submits that *Metropolitan* is dispositive of the present issue and that under its holding, Petitioners' state-law claim for "bad faith" damages is clearly preempted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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